IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1143

RAY MARSHALL, SECRETARY OF LABOR, *et al.*, *Appellant*,
v.
BARLOW'S, INC., *Appellee*.

On Appeal From The United States District Court For The District Of Idaho

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE MOUNTAIN STATES LEGAL FOUNDATION

and

BRIEF OF THE MOUNTAIN STATES LEGAL FOUNDATION AS AMICUS CURIAE

ANTHONY J. OBADAL
STEVEN R. SEMLER
STEPHEN C. YOHAY
ZIMMERMAN AND OBADAL
1101-15th St., N.W.
Suite 1010
Washington, D.C. 20005

Attorneys For The Mountain States Legal Foundation

Of Counsel:

LEONARD J. THEBERGE
EDWARD H. DOWD
WILLIAM C. MOTT
JAMES WATT
MOUNTAIN STATES LEGAL FOUNDATION

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The Mountain States Legal Foundation respectfully moves for leave to file the annexed brief *amicus curiae*.* In support of this motion, the Foundation states:

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* Pursuant to Rule 42 of the Rules of this Court, the Mountain States Legal Foundation requested consents from all parties to the

1. The Mountain States Legal Foundation was organized in early 1977 as a Colorado non-profit, tax-exempt corporation to engage in nonpartisan legal research, study and analysis for the benefit of the general public and to engage in litigation as a friend of the court at all levels of the legal process to affect evolving concepts of the law. It is supported by voluntary contributions from a cross-section of the public. The Foundation takes an interest in questions of law of a national scope and especially those that have a direct impact in the Mountain States region, including the State of Idaho where the subject case arose.

2. The issue involved in this case—whether inspectors of the Occupational Safety and Health Administration of the United States Department of Labor can, consistent with the Fourth Amendment to the Constitution, engage in indiscriminate roving searches of commercial premises without warrants based upon a showing of probable cause to a neutral magistrate—is of vital concern to every citizen and to employers, large and small, throughout the nation. Throughout the two-hundred-year history of the nation, most employers, except those in tightly regulated industries, have been free from warrantless searches of their premises by Federal officers. The Occupational Safety and Health Act challenges this traditional protection. Owing allegiance to no interest other than that of the general public, the Mountain States Legal Foundation respectfully requests leave to present its views as a friend of the Court.

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filing of a brief *amicus curiae* in support of Appellee. Counsel for Appellee furnished such consent, while the Solicitor General of the United States has authorized the *amicus* to state that he has no objection to the filing of this brief. These letters of the parties have been filed with the Clerk of the Court.

For the foregoing reasons, the Mountain States Legal Foundation respectfully requests that its motion for leave to file the annexed brief *amicus curiae*, be granted.

ANTHONY J. OBADAL

STEVEN R. SEMLER

STEPHEN C. YOHAY

ZIMMERMAN AND OBADAL
1101-15th St., N.W.
Suite 1010
Washington, D.C. 20005
Attorneys For The Mountain States Legal Foundation

Of Counsel:

LEONARD J. THEBERGE
EDWARD H. DOWD
WILLIAM C. MOTT

JAMES WATT
MOUNTAIN STATES LEGAL FOUNDATION

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BRIEF OF THE MOUNTAIN STATES LEGAL FOUNDATION AS AMICUS CURIAE

This brief *amicus curiae* on behalf of the Mountain States Legal Foundation is filed contingent upon the Court's granting the foregoing motion for leave to file a brief *amicus curiae*.

INTEREST OF THE AMICUS CURIAE

The interest of the Mountain States Legal Foundation is set forth in its annexed motion for leave to file brief *amicus curiae*.

SUMMARY OF ARGUMENT

I.

The historical antecedents of the Fourth Amendment must be given careful attention in any present analysis of the document, inasmuch as the Amendment "was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution." *United States* v. *Rabinowitz*, 339 U.S. 56, 69 (Frankfurter, J., dissenting). The colonists suffered under the "writs of assistance," by which the throne authorized indiscriminate searches of property to detect contraband in violation of restrictive trade laws. The writs were condemned as "the worst instrument of arbitrary power" by James Otis, Jr. of Boston, in oratory which crystallized colonial opposition to the writs. *Boyd* v. *United States*, 115 U.S. 616, 625 (1886).

Also prominent in the colonists' minds were parallel developments in England, where warrants had been issued for the purpose of locating the publishers of articles critical of the throne. Warrants specific as to the items sought, but indiscriminate as to the persons and places subjected to it were struck down for creating, as in the subject case, a "discretionary power given to messengers to search wherever their suspicions may chance to fall." Lasson, The History and Development of the Fourth Amendment to the United States Constitution, 45 (1937). In the case of *Entick* v. *Carrington and three Other King's Messengers*, a warrant specific as to the person but general as to the papers to be seized was also held unlawful. The *Entick* decision was later termed by this Court as "one of the landmarks of English liberty" (*Boyd* v. *United States, supra*, 115 U.S. at 625-626), which "was . . . fresh in the memories

of those who achieved our independence and established our for of government" *Frank* v. *Maryland*, 359 U.S. 360, 377 (1959).

In examining the Fourth Amendment, it must be emphasized that the Amendment first proscribes "unreasonable searches and seizures," and then goes on to define the restricted authority for a search conferred by a warrant. The first part of the Amendment, not included in the original Amendment proposal, greatly enhanced the scope of protection intended by the Amendment. Indeed, as Mr. Justice Frankfurter explained (*United States* v. *Rabinowitz, supra*, 339 U.S. at 70):

> One cannot wrench 'unreasonable searches' from the text and context of the Fourth Amendment. It was the answer of the Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope. Both were deemed 'unreasonable'.

II.

The central issue before the Court in this case is whether searches by roving bands of Federal officers, randomly probing for unsuspected violations of the Occupational Safety and Health Act in private business establishments owned by persons entitled to the protection of the Fourth Amendment, are subject to the constitutional preconditions of a search warrant. In addressing this question, it is important to bear in mind that the Fourh Amendment is to be given a "liberal construction," so as to prevent the "gradual depreciation" of rights protected thereunder. *Gouled* v. *United States*, 255 U.S. 298, 303-04 (1921).

1. Warrantless searches are *per se* unreasonable under the Fourth Amendment, absent a few "jealously and carefully drawn" exceptions. Those who would invoke the exceptions to justify warrantless searches must show "that the exigencies of the situation made that course imperative." *Coolidge* v. *United States,* 403 U.S. 443, 454-55 (1971).

In *Camera* v. *Municipal Court,* 387 U.S. 523, 528-29 (1967), this Court reversed the finding of *Frank* v. *Maryland, supra,* and rejected the assertion that Fourth Amendment interests at stake in warrantless administrative searches are merely peripheral. The Court also rejected the finding of *Frank* that the Constitutional requirement of reasonableness in searches was accomodated by safeguards circumscribing the times the inspector could enter, safeguards similarly included in Section 8 of OSHA. As the Court said in *Camera,* "broad statutory safeguards are no substitute for individualized review," 387 U.S. at 533.

In a companion case to *Camera,* the Court held in *See* v. *City of Seattle,* 387 U.S. 541 (1967), that the constitutional requirement of a search warrant incident to a random search by adminisrative authorities applies with no less force to searches of business premises. Contrary to the Government, an employer does not lose his legitimate expectation of privacy in his place of business merely by allowing employees and outside parties routinely to enter the premises. The issue is not whether opening commercial premises to one limited class of persons (employees) thereby mandates destruction of legitimate constitutional expectations of privacy towards other classes in general. Rather, the central focus is "whether the area was one in which there was a reasonable expectation of freedom from

governmental intrusion." *Mancusi* v. *DeForte,* 392 U.S. 364, 368 (1968) (emphasis added). *United States* v. *Chadwick,* —— U.S. ——, 97 S.Ct. 2476, 2483 (1977).

2. In *See, supra,* the Court was careful to save from application of the warrant requirement those inspections pursuant to "such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product." 387 U.S. at 546. Thus, *Colonnade Catering Corp.* v. *United States,* 397 U.S. 774 (1970), sanctions warrantless searches by Federal Treasury agents of licensed liquor dealers' premises for contraband liquor. *United States* v. *Biswell,* 406 U.S. 311 (1972), similarly sanctions warrantless inspection by Federal Treasury agents of a licensed gun dealer's premises. In both cases, and in subsequent decisions authorizing warrantless administrative searches under the tripartite *Colonnade/Biswell* rationale, the search was approved because the ambit of the search was narrowly focused, the affected industries were historically highly regulated, and there was identified a legislative purpose in regulating businesses engaged in inherently dangerous enterprises.

3. OSHA searches do not fall within the *Colonnade/Biswell* exception to the Fourth Amendment's warrant requirement. First, it is manifestly unfair, and legally incorrect, for the Government to suggest that warrantless OSHA searches of all employers are justified because some workers are imperiled, without regard to the specific nature of the business to be searched nor probable cause to believe that there is a violation. Second, the substantive scope of OSHA regulations is astonishingly broad, covering virtually every real or imaginary danger conceivable. Third, warrant-

less OSHA searches are not limited to licensed, pervasively regulated, or inherently dangerous businesses whose owners, by entering into such enterprises, thereby implicitly consent to a limitation upon their reasonable expectation of privacy. Indeed, OSHA reaches out to virtually every employer in the nation which employs at least one person affecting interstate commerce.

4. The Government contends that warrantless searches are critical to the proper enforcement of the Act, because a warrant requirement might result in advance notice to the employer of the imminent inspection, thus giving the employer the opportunity to conceal otherwise discoverable violations. However, it is simplistic to assert that violations in sophisticated manufacturing or processing operations can be easily concealed, and, in any event, it is unfair to justify the warrantless search of one individual's business because some other individual, in a wholly unrelated business, might attempt to avoid the operation of the statute. Also, it is only "[w]here there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of a[n offense that] . . . it is reasonable to permit action without prior judicial evaluation." *Roaden* v. *Kentucky,* 413 U.S. 486, 505 (1973). Moreover, if corrective action were taken in anticipation of an inspection, the remedial purposes of the Act would be served, not frustrated.

In sum, the Government would have this Court extend the *Colonnade/Biswell* implied consent exceptions to the warrant requirement to the point where the exception would become the norm. However, OSHA inspections bear all of the indicia of unconstitutionality found by this Court, as is plain from this Court's repeated refusals to expand *Colonnade* and *Biswell* in

derogation of *Camera* and *See. E.g., Almeida-Sanchez* v. *United States,* 413 U.S. 266 (1973); *G. M. Leasing Corp.* v. *United States,* —— U.S. ——, 97 S.Ct. 619 (1977). *Air Pollution Variance Board of Colorado* v. *Western Alfalfa Corp.,* 416 U.S. 861 (1974).

While this Court should construe a statute "so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of the statute." *Seals* v. *United States,* 367 U.S. 203, 211 (1961). As found by the Court below, there is no basis to construe a warrant requirement into the OSHA Act. Congress imposed no such requirement, even in the face of a stinging attack by 'he Congressional minority on the absence of warrant protections. See H.R. Rep. No. 91-1291, 91st Cong., 2nd Sess. 55 (1970). The failure to include a warrant provision, in the face of this criticism, strongly suggests that none was intended, and, indeed, was consciously omitted. Moreover, as the Senate Report on the OSHA bill makes clear, the purpose of Section 8(a) was to enable inspection rights, not upon presentment of a warrant, but merely upon presentment of the inspector's credentials. S. Rep. No. 91-1282, 91st Cong., 2nd Sess., 11 (1970). In sum, the search warrant requirement was rejected, and it is for Congress, not the court, to reform that fatal defect in the statute.

III.

In the event the Court elects to construe the Act so as to comply with the Fourth Amendment by requiring search warrants, the administration of the Act will not be frustrated. Most businessmen, like the home dwellers in *Camera* (387 U.S. at 539), allow OSHA inspectors into their premises. Thus, with respect to the vast

majority of inspections, a warrant requirement will present no obstruction to OSHA. Cf., *Frank* v. *Maryland*, *supra*, 319 U.S. at 384 (Douglas, J., dissenting). In those cases where consent is denied and the inspection is triggered by an employee complaint or a reported accident, there will assumedly be sufficient cause to justify issuance of a search warrant. In any event, even where advance notice may be given, there usually is no compelling urgency to make the search, since the vast majority of present OSHA searches are "general schedule", random visits. And where the employer corrects the violation upon advance notice, the purpose of the Act is served, not defeated.

ARGUMENT

I. THE PRE-CONSTITUTIONAL ANTECEDENTS

The statutory power indiscriminately to search, conferred by the Occupational Safety and Health Act, strikes against the very foundations of liberty which the nation's revolution was designed to secure. A brief review of the pre-constitutional antecedents is, therefore, appropriate.

The pre-colonial English history demonstrates that the principal manifestation of abusive governmental searches involved the throne's attempt to repress critical press commentary by authorizing indiscriminate seizure of books and papers alleged to be libelous or seditious because of their critical comment.[1] For instance, in 1566, the Court of Star Chamber decreed searches of commercial premises "in any warehouse, shop, or any other place where they suspected a viola-

[1] See generally, N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 24-50 (1937).

tion"[2] in order to seize allegedly seditious books and papers. The obnoxious use of indiscriminate searches was imposed upon the American colonists in the form of the "writs of assistance", by which the throne authorized indiscriminate searches of property to detect contraband in violation of restrictive trade laws.

The death of Charles II caused writs outstanding at the time of his death to expire.[3] Boston merchants, to whom smuggling was a way of life and whose resentment of the writs had long been smoldering, engaged James Otis, Jr., to argue against granting new writs in 1761.[4] Otis condemned the writs as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that was ever found in an English law book;" inasmuch as they placed "the liberty of every man in the hands of every petty officer."[5]

Otis' oratory crystallized colonial resistance to the oppression of the crown. John Adams, present to take notes on the proceeding, and later to take a leading role in the shaping of the Constitution, wrote of Otis' argument:[6]

[2] *Id.*, at 25.

[3] *Id.*, at 59.

[4] Many years later, John Adams wrote that the purpose of the Writs was to enable officers of the customs to call upon sheriffs "to aid them in breaking open houses, stores, shops, bales, trunks, chests, casks, packages of all sorts, to search for goods, wares and merchandise which had been imported against the prohibitions, or without paying the taxes imposed by certain acts of Parliament, called the Acts of Trade." As quoted in Griffith, In Defense of Public Liberty 14 (1976).

[5] Quoted in *Boyd* v. *United States*, 115 U.S. 616, 625 (1886).

[6] *Tudor, Life of James Otis* (1823). This Court has noted that

"Otis was a flame of fire; with a promptitude of classical allusions, a depth of research, a rapid summary of historical events and dates, a profusion of legal authorities, a prophetic glance of his eyes into futurity, and a rapid torrent of impetuous eloquence, he hurried away all before him. American Independence was then and there born . . . Every man of an immense crowded audience appeared to me to go away as I did, ready to take arms against Writs of Assistance. Then and there, was the first act of opposition, to the arbitrary claims of Great Britain. Then and there, the child Independence was born. In fifteen years, i.e., in 1776, he grew up to manhood and declared himself free."

As colonial resistance to the writs of assistance was emerging, there developed in England a parallel attack on the general warrants historically issued by the crown to suppress editorial criticism. *Boyd* v. *United States, supra,* 115 U.S. at 625-26. The most important of the English developments was John Wilkes' anonymous publication, beginning in 1762, of his series of articles known as the *North Briton.* Number 45 was particularly critical of the throne, and the Secretary of State, in retaliation, issued a warrant which was specific as to the items sought but indiscriminate as to the persons and places subjected to it. It ordered the King's men "to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled, "The *North Briton,* No.

Otis' oration against renewal of the writs of assistance occupies a prominent place in the history of the Fourth Amendment; *Frank* v. *Maryland,* 359 U.S. 360, 364 (1959); *United States* v. *Rabinowitz,* 339 U.S. 56, 69-70 (1950) (Frankfurter, J., dissenting); *Boyd* v. *United States, supra,* 115 U.S. at 625.

45, . . . and them, or any of them, having found, to apprehend and seize, together with their papers."[7]

Upon this indiscriminate authority, the crown arrested forty-nine printers before arresting Wilkes himself. Suit was brought by the printers alleging false imprisonment on grounds that the warrant was unlawfully broad. Finding authority for the "nameless warrant" wanting, Chief Justice Pratt declared that it was "a law under which no Englishman would wish to live an hour."[8] Upon the similar suit brought by Wilkes, the Chief Justice again found the warrant unlawful, condemning it for creating, as in the subject case, "a discretionary power given to messengers to search wherever their suspicions may chance to fall."[9] Chief Justice Mansfield affirmed, stating, "It is not fit that the judging of the information should be left to the officer. The magistrate should judge, and give certain directions to the officer."[10]

The *North Briton* case gave impetus to John Entick, the subject of a warrant which, in contrast to that involved in the *North Briton,* was specific as to the person but general as to the papers to be seized. Entick contested his arrest and the court held the warrant unlawful. That decision was later termed by this Court as "one of the landmarks of English liberty."[11] Moreover, as this Court observed in *Boyd* and again in

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[7] *Lasson, supra,* at 43.

[8] *Id.* at 44.

[9] *Id.* at 45.

[10] *Entick* v. *Carrington and Three Other King's Messengers,* 19 How. St. Tr. 1029 (1765).

[11] *Boyd* v. *United States, supra,* 115 U.S. at 625-26.

Frank v. *Maryland*,[12] "This history . . . was . . . fresh in the memories of those who achieved our independence and established our form of government."

Indeed, the historical antecedents of the Fourth Amendment must be given careful attention in any present analysis of the document.[13] As Mr. Justice Frankfurter admonished:

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[12] *Frank* v. *Maryland*, *supra*, 359 U.S. at 377.

[13] Indeed, "some provision with regard to search and seizure was assured a place in every state declaration or bill of rights," and "seven different states had constitutional provisions which were to serve as precedents for the Fourth Amendment." *Lasson*, *supra*, at 80, 82. The first of these, the Virginia Constitution, adopted at Williamsburg in May, 1776, contained the following at Section 10:

> That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted.

7 *American Charters*, Constitutions and Organic Laws 3814 (F. Thorpe ed. 1906).

On September 28, 1776, the State of Pennsylvania adopted its Declaration of Rights. Section 10 of the Pennsylvania Declaration was the first of the state constitutions "which closely approximated what is now the Fourth Amendment . . . It contained all the elements of the Fourth Amendment, in that it was not merely a condemnation of general warrants like the Virginia clause but also stated [by implication] the broader principle, that is, freedom from unreasonable search and seizure". *Lasson*, *supra*, at 80-81 (emphasis added):

The Massachusetts Declaration of Rights, enacted in 1780, is particularly significant, because it "offered the first expression of the phrase 'unreasonable searches and seizures' which ultimately found its way into the Fourth Amendment." *Lasson*, *supra*, at 82. Article XIV stated:

> Every subject has a right to be secure from all unreasonable searches and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or arrest one of more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases and with the formalities prescribed by the laws. *Thorpe*, *supra*, at 1891.

> It makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution . . . *United States* v. *Rabinowitz*, *supra*, 339 U.S. at 69.

It is important to note, therefore, especially in the subject case, that the Fourth Amendment first proscribes "unreasonable searches and seizures," and then goes "on to define the very restricted authority that even a search warrant issued by a magistrate could give . . ." *United States* v. *Rabinowitz*, *supra.*, 339 U.S. at 70 (Frankfurter, J., dissenting). As originally proposed, the Amendment forbade searches without warrants and merely limited the scope of the warrant. The warrant had to be based upon probable cause, a description of the person or place to be searched had to be stated, and assurance for compliance with these requirements was entrusted to a detached magistrate.[14] But while prescribing warrant requirements, the original Amendment proposal still contained no affirmative guarantee from unreasonable searches. The first part of the Amendment, affirmatively assuring that freedom, was added to cure that defect. This addition greatly enhanced the scope of protection intended by the Amendment, and makes clear that the Fourth

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[14] *Lasson*, *supra*, at 101, 120.

Amendment proscribes all unreasonable searches and seizures, and is not to be viewed merely as a requirement for, and a guide to the form of, search warrants."[15] As Mr. Justice Frankfurter explained:[16]

> One cannot wrench 'unreasonable searches' from the text and context of the Fourth Amendment. It was the answer of the Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope. Both were deemed 'unreasonable'.

Against this history the Fourth Amendment emerged which, as characterized by Justice Frankfurter in *Frank* v. *Maryland, supra,* 359 U.S. at 365, embodied no less than "the right to shut the door on officials of the state unless their entry is under proper authority of law."

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[15] This Court noted recently that the colonial history reveals "an absence of a contemporary outcry against warrantless searches in public places . . . because, aside from searches incident to arrest, such warrantless searches were not a large issue in colonial America." *United States* v. *Chadwick,* —— U.S. ——, 97 S. Ct. 2476 (1977). Nevertheless, the Court rejected the Government's contention in *Chadwick* that the Fourth Amendment warrant clause was therefore intended to apply only to intrusions into the home. Said the Court, in comments particularly applicable in the instant case:

> What we do know is that the Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth. 97 S. Ct. at 2482.

Analytically, it is, to say the least, extremely difficult to distinguish the impact upon the citizen's privacy stemming from random government searches conducted pursuant to general warrants, which were condemned strongly during colonial times, and the random government searches now conducted pursuant to the general authority claimed under the OSHA Act by the Secretary of Labor.

[16] *United States* v. *Rabinowitz, supra,* 339 U.S. at 70.

The seeds of independence forecast by Adams after Otis' argument against the writs of assistance finally matured. The Declaration of Independence thus scored the Crown: "He has erected a Multitude of new Offices, and sent hither Swarms of Officers to harrass our People, and eat out their substance." And now, on the second bicentennial celebration of the Declaration, swarms, indeed, thousands, of OSHA inspectors, relying on statutory authority, strikingly similar to that possessed by the crown's officers, inspected no less than eighty-eight thousand businesses in 1975."[17] As was the case with the writs of assistance, these invasions of private property are not predicated upon probable cause, assessment by a neutral magistrate, nor upon a warrant specifying the persons or places to be searched; they are, instead, based upon a similar statutory roving commission to investigate whatever the officer in the field determines, in his discretion, to be a suitable object to be subordinated to the exercise of such powers. These are, however, precisely the vices the Fourth Amendment was intended to prevent.

II. SEARCH WARRANTS ARE A CONSTITUTIONAL PREREQUISITE TO ADMINISTRATIVE SEARCHES BY LAW ENFORCEMENT OFFICERS, ABSENT NARROW EXCEPTIONS NOT APPLICABLE TO EMPLOYERS SUBJECT TO THE OCCUPATIONAL SAFETY AND HEALTH ACT.

The central issue before the Court in this case is whether searches by roving bands of Federal officers, randomly probing for unsuspected violations of the Occupational Safety and Health Act in private business establishments owned by persons entitled to the protection of the Fourth Amendment, are subject to

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[17] 5 Occ. Saf. & Health Rptr. (BNA) 1304.

the constitutional precondition of search warrant. The question, of course, is far broader than the constitutionality of the Occupational Safety and Health Act (hereinafter cited as "OSHA Act"), for, in an age of increasing numbers of regulatory statutes,[18] many authorizing new, self-contained administrative "police forces" like OSHA, the fundamental question presented is whether the Fourth Amendment protection —"the very essence of constitutional liberty"—shall receive, as this Court commanded half a century before the OSHA Act, "a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of the courts or by well intentioned, but mistakenly overzealous executive officers." *Gouled* v. *United States,* 255 U.S. 298, 303-04 (1921) (footnote omitted).

A. The Orienting Principles.

We begin with the following proposition, enunciated by this Court in *Coolidge* v. *United States,* 403 U.S. 443, 454-55 (1971):

> [T]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be a 'showing by those who seek exemption * * * that the exigencies of the situation made that course imperative.' (Footnotes omitted).

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[18] See Brief for the Appellants, n.25 (hereinafter cited as "Govt. Br.").

Accord: *Camera* v. *Municipal Court,* 387 U.S. 523, 528-29. See also *Cady* v. *Dombrowski,* 413 U.S. 433, 439; *United States* v. *United States District Court,* 407 U.S. 297, 314-21; *Katz* v. *United States,* 389 U.S. 347, 357. It "has been settled law in this Court for over ninety years * * * that a fundamental purpose of the Fourth Amendment is to safeguard individuals from unreasonable *government* invasions of legitimate privacy interests." *United States* v. *Chadwick, supra,* 97 S. Ct. at n.9, 2483 (emphasis added).

This Court rejected the argument in *See* v. *City of Seattle,* 387 U.S. 541 (1967), that citizens have lesser privacy interests in their business establishments than they do in their homes, and that a different standard of reasonableness applies to searches of homes than to places of business. The Court affirmed instead that:

> The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by warrant. *Id.* at 543.

With these principles in mind, we examine the Government's contention that "interests that implicate 'the essential purpose of the Fourth Amendment' " are not at stake here, and that accordingly there is "no necessity to invoke the most stringent protections of the Amendment." Br. at 29.

B. The General Rule: Camera and See

Camera v. *Municipal Court,* 387 U.S. 523 (1967) involved prosecution of an apartment leasee for refus-

ing to allow city housing inspectors access to his premises absent a search warrant. The City, contending no warrant was necessary, relied upon the San Francisco Housing Code, which provided:

> "Sec. 503 Right To Enter Building. Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code."

This provision of the San Francisco ordinance struck in *Camera* is, significantly, similar to Sec. 8(a) of the OSHA Act here involved (29 U.S.C. 657(a)):

> "Sec. 8(a). In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee."

Finding this warrantless administrative search procedure constitutionally infirm, the Court reiterated in *Camera:*

> "[O]ne governing principle, justified by history and current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." (387 U.S. at 528).

Reversing the finding of *Frank* v. *Maryland, supra,* the Court rejected the assertion that Fourth Amendment interests at stake in these inspections are merely peripheral, noting, to the contrary, that criminal sanctions were a possible outgrowth of such inspection. 387 U.S. at 530-31. Contrary to the Government (Br. pp. 33-4), that consideration is certainly no less applicable under OSHA, given that under Section 17(e) of the Act, willful non-compliance with the regulations issued by the Secretary can, in certain circumstances, result in imprisonment up to six months for a first offense, and one year for a second offense.[19] And, in any event, the Government "misreads history when it relates the Fourth Amendment primarily to searches for evidence to be used in criminal prosecutions. * * * The Fourth Amendment has a much wider frame of reference than mere criminal prosecutions." *Frank* v.

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[19] In *Wyman* v. *James,* 400 U.S. 309, 324-25 (1971), the Court held *Camera* and *See* warrant requirements inapplicable to home visits of welfare officers to applicants of certain welfare programs. The Court noted that the program benefits were voluntarily applied for, and that *Frank, Camera,* and *See* all arose in the context of a criminal prosecution for denying access to government inspectors. While the OSHA Act does not *directly* provide for criminal prosecution of employers who refuse access, OSHA obtains "inspection warrants" against the offender, for which refusal of compliance results in an arrest warrant. *OSHA* v. *Gilbert & Bennett Mfg. Co.,* —— F.Supp. ——, 5 Occ. Saf. and Health Rptr. (BNA) 1375 (N.D., Ill., May 3, 1977).

Maryland, supra, 359 U.S. at 376, 377 (Douglas, J., dissenting).[20]

Next, the Court in *Camera* rejected the finding of *Frank* that the Constitutional requirement of "reasonableness" in searches was accommodated by safeguards circumscribing the times the inspector could enter—safeguards similarly included in Sec. 8 of the OSHA Act and again relied upon by the Government here (Br., p. 18). But "broad statutory safeguards are no substitute for individualized review." 387 U.S. at 533. Such considerations "unduly discount the purposes behind the warrant machinery contemplated by the Fourth Amendment" (387 U.S. at 532): that of advising the citizen, upon the assurance of a neutral magistrate, that inspection of the premises is authorized by statute, that the inspector is properly authorized to make the search, and advising the citizen of the limits of the search authority; in short, that the citizen need not subject his property to random search simply upon the self-asserted authority of a roving inspector who may later prosecute him.[21] Considering these vices, the Court declared in *Camera,* 387 U.S. at 532-33:

[20] "To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity." *District of Columbia* v. *Little,* 178 F.2d 13, 17 (C.A.D.C. 1949) (per Prettyman, J), affirmed on other grounds, 339 U.S. 1 quoted in *Frank* v. *Maryland, supra,* 359 U.S. at 378. (Douglas, J., dissenting).

[21] See generally *Coolidge* v. *New Hampshire, supra,* 403 U.S. at 450: "prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigation . . ."; *United States* v. *United States District Court,* 407 U.S. 297, 316 (1972): "The Fourth Amendment does not contemplate the executive officers of Government as neutral and detached magistrates . . . The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and speech." (Footnote omitted.); *Frank* v. *Maryland, supra,* 359 U.S. at 382 (Douglas, J., dissenting): "History shows that all officers tend to be officious; and health inspectors, making out a case for criminal prosecution of the citizen, are no different."

> "The practical effect of this system is to leaving the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search."

Thus, contrary to the Government's assertion that "a magistrate would provide no meaningful safeguard in the present context" (Br. pp. 14-5), the Court's analysis in *Camera* compels the opposite conclusion—a conclusion only recently reinforced by the Court in *U.S.* v. *Chadwick, supra,* relying upon *Camera.*

As set forth above, in a companion case to *Camera,* the Court declared in *See* v. *City of Seattle, supra,* that the constitutional requirement of a search warrant incident to a random search by administrative authorities applies with no less force to searches of business premises (387 U.S. at 543):[22]

> [W]e see no justification for so relaxing Fourth Amendment safeguards where the official inspection is intended to aid enforcement of laws prescribing minimal physical standards for commercial premises.
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> * * *

[22] The Government asserts that the principles of *See* are inapplicable because that case involved a locked warehouse (Br. p. 32). That fact was not even recognized by this Court in its decision and is obviously of no significance.

Camera and *See* thus reflect the command of the Fourth Amendment that administrative agency inspections of private commercial premises are unconstitutional where not consented to, in the absence of a search warrant issued by a neutral and detached magistrate, which serves the beneficient purpose of assuring the occupant of the authority for, and limits of, the inspector's search.

The core of the Government's effort to distinguish the instant case from the teachings of *Camera* and *See* is its argument that "there are areas of a commercial building in which the owner does not have a significant expectation of privacy from reasonable, limited-purpose [23] inspections during business hours." (Br. pp. 28-29). This is so, the Government contends, because "routine occupation by the owner's employees and the frequent visits by . . . outside parties" such as deliverymen "effectively diminish any claim of privacy by the factory owner with respect to such area . . . ." *Id.* This argument is unresponsive to the constiutional infirmity in the OSHA Act. First, while the Government appears to concede that there are some areas of a commercial establishment wherein the owner retains a legitimate privacy interest, Section 8(a) of the OSHA Act makes no such distinction, inasmuch as it purports to authorize the OSHA Compliance Officer to search "any . . . area . . . where work is performed by an employee of an employer." (Emphasis added). Second, the con-

[23] The right of privacy protected by the Fourth Amendment "is not conditioned upon the objective, the prerogative or the stature of the intruding officer. • • • It is immaterial whether he is motivated by the highest public purpose or by the lowest personal spite." *District of Columbia* v. *Little, supra,* 178 F.2d at 17 (Prettyman, J.), quoted in *Frank* v. *Maryland, supra,* 359 U.S. at 378 (Douglas J., dissenting).

tention misperceives the relevant constitutional concern. The issue is not whether opening commercial premises to one limited class of persons (employees) thereby mandates destruction of legitimate constitutional expectations of privacy towards other classes in general. Rather, the central focus is "whether the area was one in which there was a reasonable expectation of freedom from *governmental* intrusion." *Mancusi* v. *DeForte,* 392 U.S. 364, 368 (1968) (emphasis added); *United States* v. *Chadwick, supra,* 97 S.Ct. at 2483.

Thus, in *Mancusi,* for instance, a large open area shared by the defendant union officer with other union officials was searched by officials without a warrant. Rejecting the argument that the defendant had surrendered his expectations of privacy from government intrusion because he had shared the area with other business invitees, the Court stated (392 U.S. at 369):

> DeForte still could reasonably have expected that only those persons and their personal or business guests would enter the office, . . . This expectation was inevitably defeated by the entrance of state officials . . .

Similarly, when an employer opens his non-public premises to employees, he does not thereby surrender his legitimate expectations of privacy from governmental intrusion.[24] The latter causes a dislocation of

[24] Moreover, the search conducted under OSHA is not confined to a search by regularly employed government officials. Non-governmental representatives are also authorized to join in the inspection. The provisions of Section 8(e) of the Act, 29 U.S.C. 657(e), provide that a "representative" of the employees, and the employees themselves, "shall be given an opportunity to accompany the" Compliance Officer on his walkaround inspection. To the extent that an employee representative must be invited to assist in the warrantless inspection, his presence in that capacity is an invasion of the em-

property rights of a totally different order. Indeed, subject to certain carefully circumscribed situations discussed *infra*, the owners of the nation's businesses have historically been free from unannounced random searches by roving Government agents. Such government intrusions are, therefore, and have historically

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ployer's legitimate privacy interest, and is subject to the Fourth Amendment proscriptions. For, "where the search is made at the behest of or with the assistance of law enforcement officers, there must be probable cause, and in appropriate instances an authorizing warrant, if the search is to pass constitutional muster." *United States* v. *Pryba*, 502 F.2d 391, 398 (C.A.D.C. 1974), cert. denied, 419 U.S. 1127. Accord: *United States* v. *Mekjian*, 505 F.2d 1320, 1327 (5th Cir. 1974). "A search is a search by a federal official if he had a hand in it." *Lustig* v. *United States*, 338 U.S. 74, 78 (1949).

The impact on the Fourth Amendment reasonableness of the government's search caused by the authorization granted under the Act to non-government personnel (i.e., employees and their representatives) under Section 8(e) is not commented on or even mentioned by the Government in its brief. However, upon obtaining its search order in the instant case, the Secretary, pursuant to its own rules, would have given this statutorily authorized class an opportunity to participate in the search. (See Appendix, p. 7; 29 C.F.R. § 1903.8).

Collaterally, it should be noted that OSHA recently renewed its demand that employers continue to pay the wages of employees engaged in this effort. Occ. Saf. and Health Rptr. (BNA), Vol. 7 No. 12 (August 18, 1977). But see, *Leone* v. *Mobil Oil Corp.*, 523 F.2d 1153 (C.A.D.C. 1975).

When a citizen engages in normal business pursuits, employees generally are required. Historically, the act of engaging employees has not constituted a waiver of Fourth Amendment privacy rights. Yet this is exactly what implicitly occurs as a result of Section 8(e) of the Act. Cf. *Lloyd* v. *Tanner*, 407 U.S. 562 (1972), where the Court held that the shopping center owner's opening of his premises to shoppers did not vest a First Amendment right in war protesters to handbill on those premises, inasmuch as the limited invitation to shoppers was not tantamount to an invitation to the general public for other purposes. See also *Hoffa* v. *United States*, 388 U.S. 895, 301-02 (1966).

been, unreasonable [25] and hence, unconstitutional. Accordingly, the citizenry is to be insulated from them, unless based upon a search warrant, or upon exigent circumstances justifying search without a warrant.

C. The Exigency Exception to the General Rule: *Colonnade* and *Biswell*

In *See, supra,* the Court was careful to save from application of the warrant requirement those inspections pursuant to "such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product." 387 U.S. at 546. Those exceptions were later dealt with by the Court in *Colonnade* and *Biswell.*

Colonnade Catering Corp. v. *United States,* 397 U.S. 774 (1970), sanctioned warrantless search by Federal Treasury agents of licensed liquor dealers' premises for contraband liquor. *United States* v. *Biswell,* 406 U.S. 311 (1972) similarly sanctioned warrantless inspection by Federal Treasury agents of a licensed gun dealers' premises. Both cases stressed common justification for the warrantless search. In both, the ambit of the search was narrowly focused; in one case for untaxed liquor; in the other for unlicensed guns: "The dealer is not left to wonder about the purposes of the inspector or the limits of his task" (*Biswell,* 406 U.S. at 316). Both cases also stressed that the affected industries were historically highly regulated. The liquor industry had been subject to warrantless inspection and regulation both before and after the Fourth Amend-

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[25] "[T]he reasonableness of a search can be determined independently of the warrant requirement." Note, "The Law of Administrative Inspections: Are *Camera* and *See* Still Alive and Well?" 1972 Wash. U. L. Rev. 313, 315 (1972).

ment was enacted (*Colonnade*, 397 U.S. at 75). "We deal here with the liquor industry long subject to close supervision and inspection" (*Id.*, 397 U.S. at 77). Similarly, in *Biswell, supra*, 406 U.S. at 316, the Court stressed the "pervasively regulated business" of gun dealers. The legal consequence of this history of regulation, implicitly stated in *Colonnade* and expressly stated in *Biswell*, was that persons entering such business do so with such attenuated expectations of privacy from government inspection and thereby implied consent to warrantless inspection. *Biswell*, 406 U.S. at 316; *Colonnade*, 397 U.S. at 77.

The final thread common to both cases was a related legislative purpose in regulating business engaged in an inherently dangerous enterprise: "[C]ongress has been most solicitous in protecting the revenue against various types of fraud . . ." (*Colonnade*, 397 U.S. at 75); "[I]t assures that weapons are distributed through regular channels and in a traceable manner and makes possible the prevention of sales to undesirable customers . . ." *Biswell*, 406 U.S. at 316.

D. The Progeny of *Colonnade* and *Biswell* Demonstrates The Narrowness of Their Application

Each of the cases authorizing warrantless administrative searches under the *Colonnade/Biswell* rationale have been consistent with the tripartite rationale for the warrantless search exception. In each the focus of the inspection was narrow; the employer was in a licensed or pervasively regulated industry and thereby was deemed to have an attenuated privacy interest; and the offender was usually in a potentially dangerous enterprise.

Thus, in *United States ex rel. Terraciano* v. *Montanye*, 493 F.2d 682 (C.A. 2, 1974) cert. denied sub. nom. *Terraciano* v. *Smith*, 419 U.S. 875, warrantless seizure of a pharmacist's records of narcotic and stimulent drugs was sustained because the subject statute was narrowly directed to search of a limited class of records for a limited class of drugs in an industry subject to "intensive regulation." 493 F.2d at 685. Similarly, in *United States* v. *Del Campo Baking Mfg. Co.*, 345 F.Supp. 1371 (D.Del., 1972), warrantless search of the defendant food processor's premises for adulterated food was sustained because of the demonstrable Congressional interest in quickly interdicting tainted food. 345 F.Supp. at 1376 n.12. Further, relying on *Biswell*, the Court stated (345 F.Supp. at 1371):

> The thrust of the (*Biswell*) opinion is that there is no issue of consent to a regulatory inspection conducted without a warrant when such a compliance inspection is authorized by a statute in a 'pervasively regulated business.'

Finally, in *Youghiogheny and Ohio Coal Co.* v. *Morton*, 354 F. Supp. 45 (S.D. Ohio, 1973) (three-judge court), warrantless inspections under the Coal Mine Health and Safety Act of 1969 were sustained because of the history of intense Federal regulation of coal mines since 1910. Given the "historicity of such regulation" and the resulting attenuated expectation of privacy of the mine owners, and the inherently dangerous nature of the coal mining industry, the *Biswell* exception was held to apply.[26] The Court was careful

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[26] Further, as observed by the Court in *Brennan* v. *Gibson's Products, Inc. of Plano*, 407 F. Supp. 154, 161 (E.D. Tex. 1976), appeal pending (C.A. 5, No. 76-1526), distinguishing *Youghiogheny*, the focus of the Mine Safety Act is narrow, whereas the focus of the OSHA Act is virtually unlimited.

to admonish, however, that "Our view might be entirely otherwise were we not dealing with a business context of a nearly inherently dangerous type." 364 F. Supp. at 52 n. 7.

E. OSHA Searches Do Not Fall Within Any Exception to the Fourth Amendment's Warrant Requirement.

In support of its contention that the instant case is controlled by *Colonnade* and *Biswell* and their progeny, the Government asserts that there are several exigent circumstances sufficient to justify an exception to the Fourth Amendment warrant requirement for OSHA searches. To begin with, there is implicit in the Government's reliance, near the opening of its brief, upon Congressional findings concerning industrial accident statistics, the thinly veiled suggestion that only this Court's approval of warrantless OSHA searches can save American workers from being exposed to safety and health hazards. (Br. pp. 4-5 n.2).[27] We do not

[27] The joint *amicus* brief of the Sierra Club, OCAW Union, and Friends of the Earth, while conceding that warrantless searches are presumptively unreasonable in all but "'certain carefully defined classes of cases' *Camera* v. *Municipal Court*, 387 U.S. 523, 528-9 (1967)" (Br. p. 6), such as those relating to border searches, automobile searches, searches in "open fields," and those incident to arrest, argues that this circumscribed class should include administrative regulatory public health safety searches where the urgency of the federal interest outweighs the threat to individual expectations of privacy. Initially, the premise that those narrow exceptional situations are applicable to the extremely broad inspection privilege advanced here, is dubious. In any event, even assuming the propriety of this test, its application does not militate in favor of the abrogation of the constitutional expectation of privacy it would entail. For, the "urgency" relied upon is not one of the need for *speed* in inspections, but only in having inspections at all. Indeed, OSHA's own records indicate that only a small fraction of the citations it has issued are "serious" while most are "non-serious." And while the *amici* argue, for instance, that industrial pollutants

dispute that the problems of occupational safety and health are significant, and we heartily endorse the notion that the matter properly is one for profound nationwide concern." However, the Government's argument ignores the countervailing concern that the Fourth Amendment is intended to protect individuals from unreasonable searches and seizures by their Government. Also, in attempting to implicate all employers by association in the accusation that employees everywhere are in danger, and that invasion of all employers' privacy is therefore permissible, the Government ignores the well-established proposition that, in assessing the reasonableness of a particular search, the legitimate privacy interests of the particular individual involved must be evaluated, and balanced against the competing Government interest. It is manifestly unfair, and legally incorrect, to suggest that warrantless OSHA searches of all employers are justified, because some workers are imperiled, without regard to the specific nature of the business to be searched, nor probable cause to believe that there is a violation. We respectfully urge that the Court bear in mind the in-

are not readily detectable by employees, requiring inspections not triggered by probable cause, they fail to recognize that probable cause may be established in numerous other ways (*infra*, pp. 46-47), and, significantly, do not contest that a warrant requirement, even assuming it was accompanied by notice, would permit hiding this sort of violation.

[28] The issue, however, is not as clear cut as suggested by the Government. Severe and seemingly legitimate criticism was directed at the industrial accident statistics relied upon by the majority of the House Committee on Education and Labor in reporting favorably on H.R. 16785. Committee Print, Legislative History of the Occupational Safety and Health Act of 1970, Senate Committee on Labor and Public Welfare, 1st Sess. (1971), 887-88 (hereinafter cited as "Leg. Hist.").

terests of the individual in this regard, and hold that warrantless searches premised upon the broad assumption implicit in the Government's position are unreasonable.

Second, the Government asserts that the substantive scope of OSHA searches is not impermissibly broad, because it focuses on matters limited to employee safety and health. However, the substantive focus of OSHA regulations is not narrow like the liquor regulation in *Colonnade*, the firearms control in *Biswell*, the drug control in *Terraciano*, or the adulterated food control in *DelCampo*. To the contrary, the substantive scope of OSHA regulations is nothing short of blunderbuss in approach. There are, literally, tens of thousands of regulations which have poured out of OSHA,[29] which seek to regulate virtually every real or imagined danger conceivable.[30] The regulations seemingly are cognizant of no limit.[31]

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[29] See, e.g., 29 C.F.R. Part 1910 (Occupational Safety and Health Standards for General Industry); and 29 C.F.R. Part 1926 (Occupational Safety and Health Standards for Construction).

The astonishing number and diversity of the regulations to which employers are subject under OSHA was demonstrated graphically when, in 1972, Senator Carl Curtis requested the Library of Congress to provide him with a copy of every standard incorporated in OSHA regulations by virtue of the Secretary's temporary authority, under Section 6(a) of the Act, 29 U.S.C. 655(a), to adopt as OSHA standards pre-existing industry consensus standards. After one week of work, the combined resources of the Library of Congress, the Department of Labor, and the Senator's staff could produce only two-thirds of the written regulations, and those documents alone stood four feet high. Small Business and the Occupational Safety and Health Act of 1970: Hearings before the Subcomm. on Environmental Problems Affecting Small Business of the Select Comm. on Small Business, 92d Cong., 2d Sess. 77-79 (1972) (statement of Senator Carl T. Curtis).

[30] There are, for instance, approximately twelve pages of fine-print regulations governing standards for ladders used in general industry. 29 C.F.R. §§ 1910.25, 26, 27.

[31] Indeed, the OSHA Act authorizes searches for violations of the general duty clause, Section 5(a)(1) of the Act, 29 U.S.C. 654(a)(1), to cover any conceivable situations not addressed by the standards.

Third, the Government's contention to the contrary notwithstanding, the warrantless searches made by OSHA are not limited to licensed or pervasively regulated employers, who by entering certain enterprises thereby implicitly consent to a limitation upon their reasonable expectation of privacy. Nor are the warrantless searches confined to industries determined to be inherently dangerous. Cf., *Youghiogheny and Ohio Coal Co.* v. *Morton, supra,* 364 F. Supp. at 52 n.7. Indeed, OSHA reaches out to virtually every employer in the nation which employs at least one person in interstate commerce[32] in businesses which may be in no way federally licensed or specially federally regulated. As noted in *Brennan* v. *Gibson's Prod. Inc. of Plano,* 407 F. Supp. 154, 161 (E.D. Tex. 1976) (appeal pending C.A. 5, No. 76-1526):

> Made subject to [OSHA's] warrantless inspection is every private concern engaged in a business affecting commerce which has employees and all 'environments' where these employees work. It thus embraces indiscriminately steel mills, automobile plants, fishing boats, farms and private schools, commercial art studios, accounting offices, and barber shops—indeed, the whole spectrum of unrelated and disparate activities which com-

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[32] Thus, in introducing the Conference reported version of the OSHA bill as finally enacted, Congressman Steiger proclaimed that, "[t]he coverage of this bill is as broad, generally speaking, as the authority vested in the Federal Government by the Commerce Clause of the Constitution." Leg. Hist. 1216.

pose private enterprise in the United States (Footnote omitted.)

In its effort to convince the Court that this case is controlled by the *Biswell-Del Campo* rationale, the Government suggests that pervasive federal regulation of workers' safety and health is nothing new, and "that at least two generations of employers have been subjected to extensive federal regulation of employee safety and health." Br. 43. However, the mere enactment of the OSHA statute undermines the Government's contention, for if industry had previously been subject to pervasive federal safety and health regulation, there would have been no need for the statute. Further, the Government's contention appears to be at odds with the understanding of one of the Act's sponsors, Representative Steiger, who declared, upon submitting the Conference-reported bill to the House: "[I]n this session of Congress the House and Senate have passed for the first time in our Nation's history comprehensive occupational safety and health legislation." Leg. Hist. 1216. Plainly then, regulation of the scope contemplated by OSHA is unprecedented in this nation, and it is a misreading of history to suggest that the legitimate privacy interests of employers in all industries have been lessened by a pattern of pervasive federal regulation of employee safety and health.[33]

[33] It is likewise inaccurate to say that such state or industry regulation of safety and health as may have existed before enactment of the OSHA statute justifies the conclusion that there is a long history of pervasive regulation of employee safety and health. See Govt. Br., at 43 n.23. Indeed, Section 18 of OSHA, 29 U.S.C. 667, which divested the States of jurisdiction over safety and health matters, pending the Secretary's approval of state safety and health plans, was enacted in response to Congress' judgment that state regulation had been historically inconsistent. See, e.g., Leg. Hist. 144, 161, 342-343, 861. The Government's reliance (Br. 43) on the Walsh-Healey Act of 1936, 41 U.S.C. 35 *et seq.*, is also misplaced, given that compliance with the very state safety standards found insufficient by Congress in enacting OSHA is "prima facie evidence of compliance" with Walsh-Healey. 41 U.S.C. 35(e). Moreover, Walsh-Healey and OSHA are plainly distinguishable, inasmuch as the former had "never been enforced in the absence of specified standards." Leg. Hist. 880.

Fourth, the Government contends that warrantless searches are critical to the proper enforcement of the OSHA Act, because a warrant requirement might result in advance notice to the employer of the imminent inspection, thus giving the employer the opportunity to conceal otherwise discoverable violations. To begin with, the Government's assertion in this regard reveals again the danger inherent in any effort to paint American industry with one broad brush for purposes of constitutional analysis. The OSHA statute purports to regulate all kinds of businesses, from the smallest retail shop to the most massive refinery. It is simplistic to assert that the imposition of a warrant requirement would enable the operator of a multi-million dollar chemical processing plant, for example, to conceal on short notice, employee exposure to impermissible levels of air contaminants, unless the operator simply shuts down the extraordinarily expensive operation. It is not as if the processor, like the operator of a less complicated business, can simply move his few employees elsewhere, thus allowing maintenance of expensive equipment to lapse, or alter some small physical structure to conceal on OSHA violation. Yet the Government's analysis would hold that the privacy interests of the former must fall because citation avoidance techniques may be more readily available to the latter. Once again, the analysis is unfair, and ignores the par-

ticular circumstances and privacy interests of the individuals who are the subject of OSHA searches.

In any event, this Court has determined that, with regard to the claim that Fourth Amendment protections must fall in order to prevent the destruction of incriminating evidence, it is only "[w]here there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of a[n offense that] . . . it is reasonable to permit action without prior judicial evaluation." *Roaden* v. *Kentucky*, 413 U.S. 496, 505 (1973). In announcing this principle, the Court rejected the assertion that exigent circumstances justify a warrantless search and seizure of an obscene film, simply because the film "may be compact, easy to destroy or to remove to another jurisdiction, and may be subject to pretrial alterations by cutting out scenes and resplicing reels." *Id.* at 505 n.6. That the film was scheduled for regular exhibition to the public was deemed sufficient to support the conclusion that the procuring of a warrant need not result in the loss of evidence. Applying this analysis in the instant case, to justify warrantless OSHA searches would require the assumption that employers would discontinue regularly scheduled operations to conceal OSHA violations, an assumption of highly doubtful validity, indeed. Accordingly, even assuming, unrealistically, that most OSHA violations are capable of quick concealment, the possibility of such subterfuge does not justify the conclusion that warrantless OSHA searches are uniformly permissible;[34] in any event, even if such

[34] Moreover, most businessmen, like the home dwellers in *Camera, supra*, 387 U.S. at 539, allow OSHA inspectors into their premises. "Submission by the overwhelming majority of the populace indicates that there is no peril to the [safety and] health program." *Frank* v. *Maryland, supra*, 359 U.S. at 394 (Douglas, J., dissenting).

corrective action were taken, the remedial purposes of the Act would be encouraged, not frustrated.

In sum, the Government would have this Court extend the *Colonnade-Biswell* implied consent exceptions to the warrant requirement to the point where the exception would become the norm.[35] For, "It is the consent exception that has been potentially expanded to the point of swallowing the constitutional safeguard intended as the general rule." Note "the Law of Administrative Inspections", *supra*, 1972 Wash. U. L. Rev. at 332. Indeed, the inescapable implication inherent in the Government's position is that, by entering into any business in the United States, an individual loses his otherwise legitimate privacy interests to a degree sufficient to justify warrantless administrative searches of his place of business. The Government is sufficiently concerned with this implication, as it should be, to take pains expressly to deny it (Br. 44), but it cannot be avoided. In any event, warrantless OSHA inspections bear all of the indicia of unconstitutionality found by this Court: the roving bands of inspectors probing private property on their own initiative and in their own discretion; the absence of assurance to the occupant by a neutral magistrate that the inspector is authorized to inspect private property, nor what the limits of his powers are. And for those few brave enough to resist, an arrest warrant may well follow.[36] These considerations, together with

[35] The Secretary urged the same extension of the *Colonnade-Biswell* exception in *Dunlop* v. *Hertzler Enterprises, Inc.*, 418 F. Supp. 627 (D. New Mexico, 1976) appeal pending, (C.A.10, No. 76-2020). However, after reviewing *Camera, See* and their progeny, the Court rejected the Secretary's argument.

[36] *OSHA* v. *Gilbert & Bennett Mfg. Co., supra*, at n.19.

the very breadth of the Act which touches employers never before subject to such federal regulation, and the corresponding potential for abuse, compels adherence to, rather than departure from, the Fourth Amendment.

F. The Vitality of *Camera* and *See*

The propriety of the conclusion that warrantless OSHA searches are unconstitutional is confirmed by this Court's repeated refusals to expand *Colonnade* and *Biswell* in derogation of *Camera* and *See*. See *Dunlop* v. *Hertzler Enterprises, Inc., supra*. Indeed, the narrowness accorded the *Colonnade* and *Biswell* decisions, as *Terraciano, Del Campo,* and *Youghiogheny* demonstrate, is consistent with the mandate of this Court that exceptions to the constitutional warrant requirement are "jealously and carefully drawn." *Jones* v. *United States,* 357 U.S. 493, 499 (1958).

Thus, in *Almeida-Sanchez* v. *United States,* 413 U.S. 266 (1973), the Court held violative of the Fourth Amendment warrantless searches of automobiles made without probable cause by roving patrols of the U.S. Border Patrol near the U.S. border.[37] Rejecting the Government's reliance upon *Colonnade* and *Biswell,* the Court emphasized the narrow scope of the holding in those cases (413 U.S. at 271):

[37] The *Almeida* holding was extended to proscribe stopping of automobiles near the border solely for questioning of its occupants by roving patrols of the U.S. Border Patrol. *United States* v. *Brignoni-Ponce,* 422 U.S. 873 (1975). *Almeida* was distinguished in *United States* v. *Martinez-Fuerte,* 428 U.S. 543 (1976), where the Court sustained warrantless stopping of autos for checks at fixed point border patrol stations. The Court cited the lesser expectation of privacy in autos, the minimal nature of the intrusion, and the advance knowledge of the occupant that he would have to pass through the check point.

> A central difference between those cases and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, . . . The businessman in a regulated industry in effect consents to the restrictions placed upon him.

Rather, the Court saw in *Almeida* the same sources of concern that the *Camera* and *See* decisions were predicated upon (413 U.S. at 270):

> The search in the present case was conducted in the unfettered discretion of the members of the Border Patrol, who did not have a warrant, probable cause, or consent. The search thus embodied precisely the evil the Court saw in *Camera* when it insisted that the 'discretion of the officer in the field' be circumscribed by obtaining a warrant prior to the inspection. (Footnote omitted.)

In *G. M. Leasing Corp.* v. *United States,* —— U.S. ——, 97 S.Ct. 619, 628-31 (1977), the Court held invalid, under the Fourth Amendment, a warrantless search of business premises by Internal Revenue Service agents. Again the Government attempted to come within the cloak of *Colonnade* and *Biswell.* Again the Court rejected that assertion, pointing out that the defendant was neither in a highly regulated industry nor one implicitly open to inspection because of the nature of the industry involved. 97 S. Ct. at 629. Returning to the rule of *Camera* and *See,* the Court reiterated that warrantless inspections are constitutionally impermissible "except in certain carefully defined classes of cases . . .". *Id.* at 628.

Finally, in *Air Pollution Variance Board of Colorado* v. *Western Alfalfa Corp.,* 416 U.S. 861 (1974), a

Colorado health inspector entered the outdoor premises of the company without a warrant, and took an air sample to check compliance with Federal Environmental Protection Agency air quality standards. The Court found no Fourth Amendment infringement because the inspection took place on premises open to the public and the air pollutants could be observed from miles away.[38] Upon the basis that the search did not pertain to any of the interior premises or equipment of the company, the Court accordingly concluded (416 U.S. at 864): "We adhere to *Camera* and *See* but we think they are not applicable here. The field inspector did not enter the plant or offices." The subject case, in

[38] The *amicus brief* of the *Sierra Club, et al.*, argues that affirmance of the decision below "would have a devastating effect on the Federal Government's pollution control and public health protection efforts in many other areas" (Br. pp. 13-14, and Appendix II thereto). This, of course, is questionable, and, in any event, the point is not controlling here since the industries subjected to pollution control statutes are highly regulated, the nature of the search is narrow, or the industry involved is inherently dangerous. Moreover, the constitutionality of the statutes to which the *Amici* refer will have to be determined in cases other than this one. Affirmance of the Decision below, therefore, will not reach, let alone have any devastating impact, on these areas of the *amici's* concern.

In this regard, it is well to be wary, as Mr. Justice Douglas has warned, of the claim that certain public purposes somehow take precedence over all others, so as to justify abandonment of the Fourth Amendment (*Frank* v. *Maryland, supra,* 359 U.S. at 382 (Douglas, J., dissenting)):

> One invasion of privacy by an official of government can be as oppressive as another. Health inspections are important. But they are hardly more important than the search for narcotic peddlers, rapists, kidnappers, murderers, and other criminal elements. As we have seen, searches were once in their heyday when the government was out to suppress the nonconformists. That is the true explanation of *Entick* v. *Carrington* . . . It would seem that the public interest in protecting privacy is equally as great in one case as in another.

contrast, presents the converse of *Western Alfalfa,* and the logic of the Court's reasoning therein supports the propriety of the conclusion that OSHA inspections of private commercial premises come within the warrant requirement of *Camera, See,* and the Fourth Amendment.

III. THE THREE-JUDGE COURT BELOW PROPERLY RULED THAT SECTION 8(a) OF THE ACT SHOULD BE DECLARED UNCONSTITUTIONAL.

The three-judge Court below declared Section 8(a) of the OSHA Act unconstitutional. The three-judge Court in *Brennan* v. *Gibson's Products, Inc. of Plano supra,* 407 F. Supp. at 162-163, and the Court in *Dunlop* v. *Hertzler Enterprises, Inc., supra,* while in agreement that warrantless searches by OSHA inspectors are impermissible, construed the statute as to require a warrant rather than declare the provision unconstitutional. While this Court has declared that its task is to construe a challenged statute, if it can, "if consistent with the will of Congress, so as to comport with constitutional limitations," (*United States Civil Service Commission* v. *National Ass'n of Letter Carriers, AFL-CIO,* 413 U.S. 548, 571 (1973)), the Court has also said that, although it "will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute." *Seals* v. *United States,* 367 U.S. 203, 211 (1961). It is submitted, as found by the Court below, that there is no basis to construe a warrant requirement into the OSHA Act.

To begin with, Congress imposed no such requirement, even in the face of a stinging attack by the Congressional minority on the absence of warrant protections. Thus, a minority report on an early version of the bill protested: [39]

> Ill-advised inspections provisions. H.R. 16785 authorizes searches of employer establishments for safety and health violations. Such searches may be conducted without a warrant and individuals who are not government officials may participate in the search. Evidence so obtained may be used in a criminal prosecution. Anyone who gives advance notice of, or who forceably resists such a search may be subject to criminal prosecution.
>
> These provisions, in our view, indicate the unfortunate direction of this bill. The major approach is penal. It is more concerned with catching employers at some wrong doing than with obtaining safe and healthful working conditions.
>
> The fourth amendment of our constitution was designed to safeguard the privacy and security of individuals against arbitrary invasions and searches by government officials. (*Norman See* v. *City of Seattle*, 337 US 541; *Camera* v. *Municipal Court* 387 US 523). The amendment is a concrete expression of a right that is basic to a free society. (*Wolf* v. *Conorado*, 338 US 25, 27). As a general rule, a search of private property must be decided by "a judicial official, not by a police or government enforcement agent." (*Johnson* v. *US* 333 US 10, 14).
>
> Yet, instead of limiting this extraordinary power to government agents acting in carefully restricted circumstances the bill provides for participation in the search by non-government personnel. Even the

[39] H.R. Rep. No. 91-1291, 91st Cong., 2nd Sess. 55 (1970).

> use of advance notice of intention to search, relied on by some jurists to justify non-warrant inspections in some limited circumstances, is prohibited by the bill. (*See* v. *Seattle* 387 US 541, 549). Advance notice of inspection should obviously be permitted not only to satisfy constitutional consideration but also to permit appropriate company officials to be present in order to immediately correct any violation found.
>
> Lastly, it should be noted that the only way an employer may test the constitutional validity of the search provided for by this legislation is by risking a conviction for forceably resisting the effort to inspect.

The failure to include a warrant provision, in face of this criticism, strongly suggests that none was intended and indeed, was consciously rejected.[40] Moreover, as the Senate Report on the bill makes clear, the purpose of Section 8(a) was to enable inspection rights, not upon presentment of a warrant, but merely upon presentment of the inspector's credentials. S. Rep. No. 91-1282, 91st Cong., 2nd Sess., 11 (1970) stated:

> In order to carry out an effective national occupational safety and health program, it is necessary for government personnel to have the right of entry in order to ascertain the safety and health conditions and status of compliance of any covered employing establishment. Section 8(a) therefore authorizes the Secretary or his representative, upon presenting appropriate credentials, to enter

[40] A survey of the complete legislative history of the Act reveals that the only substantive change in the inspection section was the addition of the words "without delay" at the insistence of the House, in order to prevent evasion of an inspection. Leg. Hist., at 1076-1077, 1189. See also, *Id.* at 11, 46, 92, 151, 171, 249, 546, 608, 639, 663, 735, 782, 836, 852, 869, 949, 1097, 1163.

> at reasonable times the premises of any place of employment covered by this act, to inspect and investigate within reasonable limits all pertinent conditions, and also to privately question owners, operators, agents or employees.

And while the *Gibson's* Court [41] construed a constitutional warrant interpretation from the remarks of one of the bill's authors, Congressman Steiger, that the Secretary "would have to act in accordance with applicable constitutional protection",[42] that passage only serves to corroborate the view that no warrant was intended. For that "assurance" arose in the context of Congressman Steiger's explaining that the power of the inspector to enter was complete once the inspector tendered his credentials and entered at a reasonable time—precisely the type of "broad statutory safeguards" which were found constitutionally insufficient by this Court in *Camera* v. *Municipal Court, supra,* 387 U.S. at 532-33. Finally removing any doubt as to the "applicable constitutional protections" contemplated by Congressman Steiger was his speech on the Floor of the House on January 6, 1977, denouncing the subject *Barlow's* decision, and asserting "Warrantless civil inspections are both absolutely essential to this Act's enforcement and a longstanding federal practice . . .".[43]

That Congress did not intend for a warrant provision is further confirmed by the scheme and legislative

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[41] See also *Brennan* v. *Buckeye Industries,* 374 F. Supp. 1350, 1354 n. 6 (S.D. Ga., 1974); *Accu-namics, Inc.* 1 O.S.H. (BNA) 1751, 1754 (1974), enforced, 515 F.2d 828, 833-34 (C.A. 5, 1975).

[42] 116 Cong. Rec. 38, 709 (1970).

[43] Occupational Safety and Health Reporter 1043 (BNA) (1977).

history of Section 8(f)(1) of the Act,[44] which requires the Secretary to conduct a "special inspection" upon the complaint of an employee or employee representative, if the Secretary first determines that "there are reasonable grounds to believe" that the complained of danger or violation exists at the employer's workplace. In the Congressional debates over this provision, serious concern was expressed over the potential for harassment of employers by disgruntled employees or employees' representatives, who may seek to trigger repeated inspections of a particular employer by invoking the Section 8(f)(1) complaint procedure.[45] Notwithstanding this expressed concern, and although it

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[44] Section 8(f)(1) of the Act, 29 U.S.C. 657(f)(1), provides:

> Any employees or representatives of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. *If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representatives of the employees in writing of such determination.* (emphasis added).

[45] See, e.g., Leg. Hist. 347-48, 398-99 (comments of Senator Saxbe); *Id.* at 1219 (comments of Representative Steiger).

was contemplated that the Secretary would perform what amounts to a probable cause determination with respect to employee complaints,[46] Congress chose not to require a warrant for employee-triggered inspections. Given this history, the conclusion that Congress affirmatively eschewed a warrant requirement for OSHA searches is inescapable.

In sum, the Act contemplated that presentment of the roving inspector's credentials and limiting entry to reasonable times would satisfy the Fourth Amendment; the requirement of a search warrant issued by a detached magistrate to protect the public was rejected. This fatal defect is the subject of reformation by Congress, not the courts.

IV. EVEN IF THE ACT IS JUDICIALLY CONSTRUED TO REQUIRE A SEARCH WARRANT, THE PURPOSES OF THE ACT WILL NOT THEREBY BE FRUSTRATED.

As demonstrated in Part III, *supra,* Congress intended OSHA inspections to be conducted without a search warrant. For that reason, Section 8(a) of the Act should be declared unconstitutional. However, in the event the Court elects to construe the Act so as to comply with the Fourth Amendment by requiring search warrants, that approach will not frustrate administration of the Act.

As is the case under the current mode of administering the statute, most businessmen, like the home dwell-

[46] The Secretary's "probable cause" determination is, of course, constitutionally infirm. *United States* v. *United States District Court, supra,* 407 U.S. at 316.

ers in *Camera* (387 U.S. at 539), allow OSHA inspectors into their premises. Thus, with respect to the vast majority of inspections, a warrant requirement will present no obstruction to OSHA. Cf., *Frank* v. *Maryland, supra,* 359 U.S. at 384 (Douglas, J., dissenting). In those remaining cases where consent is denied and the inspection is triggered by an employee complaint[47] or a reported accident,[48] the inspector will assumedly have sufficient cause to justify a routine issuance of a search warrant. Similarly, the Secretary may canvass employer accident and illness records required by Sec. 8(a)(2) to determine whether such incidence reflects probable cause to believe the Act is being violated. Indeed, as one court stated[49] in declaring OSHA constitutionally subject to a warrant requirement based upon an individual showing of probable cause:

[47] In 1975 there were 7399 inspections initiated by employee complaints. 5 Occ. Saf. & Health Rptr. (BNA) 1304. Interestingly, when an employee files a complaint, OSHA must first satisfy itself, under Sec. 8(f)(1), that "there are reasonable grounds to believe that such violation or danger exists" before inspecting the premises. It is observed, perhaps ironically, that there is therefore greater employer exposure to an inspection where there is no complaint, then where there is. In any event, even the procedure on employee complaints fails to disarm the constitutional infirmity because the determination to search is made by the law enforcement officer, rather than a neutral magistrate, and no warrant issues for the protection of the citizen. Cf. *United States* v. *U.S.D.C., supra,* 407 U.S. at 317.

[48] Reports of work related deaths must be immediately made to OSHA pursuant to 29 C.F.R. § 1904.8. See also Section 8(c)(2) of the Act, 29 U.S.C. 657(c)(2).

[49] *Marshall* v. *Shellcast Corp., et al.,* —— F. Supp. ——, 5 OSHC (BNA) 1689 (Nos. 77-P-0995-E; 77-P-0996-S; N.D. Ala., July 26, 1977).

> It may be noted that had the OSHA agents requested information such as contained on OSHA Forms 100, 101 and 102 and had been denied that information by the respective defendants, or if the OSHA agents had, from inspecting such reports or Report Form 103 or any other special reports that might have been given, come to the conclusion that these defendants or others bore a particular reason for inspection, or if there had been complaints by employees or others as to hazardous conditions or possible violations, or if prior inspections had indicated serious problems of potentially serious problems, certainly by changing some of the facts, this order and this decision could likewise have been changed or be changed.

None of this requires advance notice to the employer by OSHA.

But even if advance notice were given, "there is no compelling urgency to inspect at a particular time on a particular day," (*Camera* v. *Municipal Court, supra.*, 387 U.S. at 539), which a warrant requirement might impede. For, under OSHA's current administration of the statute, approximately seventy-five percent of OSHA inspection are "general schedule" random visits.[50] As in *G.M. Leasing Corp.* v. *United States, supra,* 97 S.Ct. at 631, "The statute simply does not focus on situations involving a need for rapid action." Indeed, as noted above, given the staggering breadth of the OSHA safety regulations in those cases where consent to the inspection is not forthcoming and the inspector has to seek a warrant, the likelihood of the employer being able to ascertain and correct a violation, or conceal it, would be remote, unlike the situation attend-

[50] 5 Occ. Saf. & Health Rptr. (BNA) p. 1304.

ant to contraband drugs, liquor, or weapons. And even if a potential violation were corrected while the inspector was in the process of obtaining a warrant, the remedial purposes of the Act would be furthered, not hindered. For it is the purpose of the Act to remedy unsafe conditions, not to punish the offender. Moreover, successful concealment would be unlikely since the Act authorizes the inspector to privately question employees during his inspection of the premises.

In sum, where the government elects not to tip its hand that an inspection is imminent, there is ample basis for establishing probable cause to obtain a warrant without further notice.

Moreover, the warrant requirement presents no more of an intrusion upon the advance notice concern than OSHA's current practice of seeking an "inspection warrant" when consent to inspect is refused.[51] In the "inspection warrant" situation, OSHA tips its hand that a search is imminent by going to district court after consent to enter is refused. No greater notice would be involved if a search warrant were required instead. Thus, there is no greater exposure to advance notice under a search warrant procedure than under the present "inspection warrant" procedure espoused as adequate by the Government. The difference between the two modes of procedure is that one requires a demonstration of probable cause while the other does not. The choice, then, reduces itself not to the makeweight of "advance notice" but rather whether insistence upon the constitutional safeguard of probable cause is

[51] See *Brennan* v. *Gibson's Products Inc. of Plano, supra; Dunlop* v. *Hertzler Enterprises, Inc., supra; Brennan* v. *Buckeye Industries, Inc., supra.*

to be excused for the sake of expediency to search premises where there is absolutely no reason to believe that a violation of law has occurred. That there may be serious imagined problems in a workplace when there is no basis for knowing so, is no reason for dispensing with constitutional safeguards. As this Court stated in *Almeida-Sanchez* v. *United States, supra,* 413 U.S. at 274-275:

> It is not enough to argue, as does the Government, that the problem of detering unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.

To be sure, a warrant requirement may put a crimp in OSHA's inspection attempts where there is neither consent nor probable cause. However, the short answer to that concern is that "there is no principle in the jurisprudence of fundamental rights which permits constitutional limitations to be dispensed with merely because they cannot be conveniently satisfied." *United States* v. *Martinez-Fuerte, supra,* 428 U.S. at 575 (Brennan, J., dissenting).

Finally, as *Camera* teaches, the probable cause standard is not inflexible; it varies with the circumstances and may be more relaxed in a safety context compared to a criminal one. (387 U.S. at 538). It is suggested that probable cause to justify a warrant might exist on the basis of an employee complaint, a reported accident, inspection of the employer's accident and illness

logs, or his history of violations. In this fashion, the vitality of the right to inspect where consent is denied may be preserved consistent with the protections of the Constitution.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

ANTHONY J. OBADAL
STEVEN R. SEMLER
STEPHEN C. YOHAY
ZIMMERMAN AND OBADAL
1101-15th St., N.W.
Suite 1010
Washington, D.C. 20005

Attorneys For The Mountain States Legal Foundation

Of Counsel:

LEONARD J. THEBERGE
EDWARD H. DOWD
WILLIAM C. MOTT
JAMES WATT
MOUNTAIN STATES LEGAL FOUNDATION